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IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM IRVING WOODFORD ..... *Petitioner*

v.

THE UNITED STATES ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF CLAIMS

WILLIAM IRVING WOODFORD
Petitioner
Pro Se

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Comes, William Irving Woodford, petitioner *pro se*, and prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the court below has not been officially reported as of the date of this petition to the best knowledge of the petitioner. A printed copy of the opinion is attached hereto. (Appendix A)

JURISDICTION

The judgment of the court below was entered May 8, 1957. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Is the petitioner entitled to the active duty pay of a grade and rank in which he served and was duly commissioned?

2. Was the petitioner retained on active service in the Army until such time that he had reached a point where he would not be further benefitted by retention in a military hospital or in the military service?

3. Did petitioner receive a full and fair hearing as to his physical evaluation?

4. Was petitioner's separation from active service, not by reason of physical disability, in accordance with the facts and the law?

STATUTES INVOLVED

Act of June 19, 1948 (62 Stat. 489; 10 U.S.C. 499) provides:

> "Notwithstanding any other provision of law, the President is authorized and directed to retain in service disabled officers, warrant officers, and flight officers of the Army and the Air Force of the United States until their treatment for physical reconstruction has reached a point where they will not be further benefited by retention in a military hospital or in the military service."

Section 402 (b) of the Career Compensation Act of 1949 (63 Stat. 817; 37 U.S.C. 272 (b)) provides:

> "Upon a determination of the Secretary concerned (1) that a member of a Regular component of the uniformed services entitled to receive basic pay who has been called or ordered to extended active duty for a period in excess of thirty days, is unfit to perform the duties of his office, rank, grade or rating by reason of physical disability incurred while entitled to receive basic pay; (2) that such disability is not due to the intentional misconduct or willful neglect of such member and that such disability was not incurred during a period of unauthorized absence of such member; (3) that such disability is 30 per centum or more in accordance with the standard schedule of rating disabilities in

current use by the Veterans Administration; (4) that such member has completed at least eight years of active service as defined in section 282 of this title and (5) that accepted medical principles indicate that such disability may be of a permanent nature, the name of such member shall be placed upon the temporary disability retired list of his service by the secretary concerned and such members shall be entitled to receive disability retirement pay as prescribed in subsection (d) of this section; PROVIDED that if condition (5) above is met by a finding that such disability is of a permanent nature, such member may be retired by the Secretary concerned and, upon retirement shall be entitled to receive disability retirement pay as prescribed in subsection (d) of this section; PROVIDED FURTHER, That if condition (3) above is not met because the disability is determined to be less than 30 per centum, the member concerned shall not be eligible for any disability retirement provided in this section, but may be separated for physical disability from the service concerned and upon separation shall be entitled to receive disability severance pay as prescribed in section 273 of this title: AND PROVIDED FURTHER, that regardless of the percentage of disability determined to have been incurred, if condition (4) above is not met because the member concerned has completed less than eight years of active service as defined in section 282 of this title at the time he would otherwise have been retired pursuant to this subsection, the member concerned shall not be eligible for any disability retirement provided in this section, but may be separated for physical disability from the service concerned and upon separation shall be entitled to receive disability severance pay as prescribed in section 273 of this title."

Section 201 (b) of the Career Compensation Act of 1949 (63 Stat. 806) provides:

"For basis pay purposes, commissioned officers are hereby assigned by rank or grade in

which serving, whether under temporary or permanent appointment, to the various pay grades prescribed for commissioned officers by subsection (a) of this section as follows: . . ."

Section 412 of the Career Compensation Act of 1949 (63 Stat. 824; 37 U.S.C. 282) provides:

> "For purposes of this title, the term 'active service' shall be interpreted to mean (1) for members of the Regular components of the uniformed services and for those members, former members, and persons referred to in section 411 (1), (3) and (4), all service as a member of the uniformed services, or as a nurse, or as a contract nurse prior to February 2, 1901, or as a contract dental surgeon; . . . (2) for members of the reserve components of the uniformed services other than commissioned officers of the Reserve Corps of the Public Health Service and for former members referred to in section 411 (2) that service which is equal to the number of years which would be used by such members as a multiplier in the computation of their retired pay pursuant to section 303 of the Act of June 29, 1948; and (3) for commissioned officers of the Public Health Service, heretofore retired for physical disability or hereafter retired or separated for physical disability pursuant to this Act in addition to the service creditable as active service under (1) above, their service, other than commissioned service with the Public Health Service."

Section 413 of the Career Compensation Act of 1949 (63 Stat. 824; 37 U.S.C. 283) provides:

> "The Secretary concerned shall prescribe regulations for the administration of this title within his department or agency, including regulations which shall provide that no member of the uniformed services shall be separated or retired for physical disability without a full and fair hearing if such member shall demand it."

Paragraph 16, Army Special Regulations 615-105-1 in force August 9, 1950, provided among other things,

> "That officers of plaintiff's category were entitled to enlist in the Regular Army as a Master Sergeant."

Army Special Regulations, 600-450-1, provides in substance,

> "That the standard schedule for rating disabilities in current use by the Veterans' Administration would be used in rating disabilities by Army Physical Evaluation Boards, and also that the occupation and/or profession of the individual would be taken into account in determining percentages of disabilities."

Paragraph 2 c (9), Army Regulations, 600-10, provides:

> "Refusal of medical, surgical or dental treatment by persons subject to military law.
>
> "If a person in the military service refused to submit to medical or surgical (including dental) operation, treatment or diagnostic procedures, such person will be examined by a board of three medical officers convened by the Army Commander concerned or by a commander of a base or general hospital, or a commanding officer of any post, camp, or station where there are four or more Medical Officers on duty. If, in the opinion of the board, the operation, treatment, or diagnostic procedure advised is necessary to enable such person to perform properly his military duties and will normally have such effect, and he persists in his refusal after being notified of the findings of the board, he may be tried by court martial. Whether disciplinary action is taken or not, such other action within the law and regulations as may be appropriate with a view to the person's discharge or retirement may be taken or initiated. All such cases shall be referred to the office of the Surgeon General for con-

sideration and review before court martial is instituted, or discharge or retirement initiated. Emergency diagnostic measures, treatment, or surgery necessary to protect the health or life of a patient mentally incompetent from psychiatric causes or from the effects of his disease or condition may be performed without submission to a board."

United States Veterans' Administration Extension 7, Schedule for Rating Disabilities, 1945 Edition, provides, in part, as follows:

> "Under authority of Veterans' Regulations 3 (a), issued pursuant to Public Law No. 2, 73rd Congress, and Public Law No. 45, 79th Congress, the following extension of the 1945 Schedule of Rating Disabilities is promulgated:"
>
> * * *
>
> 6. Diagnostic Code 7321, Amebiasis. The diagnosis dysentery amebic, is replaced by the terms amobiasis, with the same diagnostic code number, with the following ratings. . . ."

STATEMENT OF FACTS

Petitioner is a Lieutenant Colonel in the United States Army Reserve. He began his military service as an enlisted man in the Arkansas National Guard on June 1, 1921, and served in that organization, as set forth in opinion of Court Below, until January 6, 1941. From October 24, 1923, to August 26, 1940, he was a full time employee on active service as defined by Section 412 of the Career Compensation Act of 1949, as caretaker-mechanic under Authority of Section 90, National Defense act, as amended.

For more than six months prior to July 16, 1947, petitioner while a Major, Army of the United States, served in an assignment appropriate to a Lieutenant Colonel. On July 16, 1947, he was commissioned as a Lieutenant Colonel

in the Army of the United States and continued to serve in that grade; that petitioner held a concurrent reserve commission in that rank is not denied.

On November 17, 1949, petitioner was admitted to hospital due to illness which was disabling. He was told that he had amebic dysentery involving the colon and received treatment therefor.

On or about December 20, 1949, petitioner was notified of his scheduled relief from active service as an officer, as a result of his selection for separation under the provisions of the Officers' Personnel Reduction Act of 1947, Section 515 (d) as admitted by defendant's answer.

On or about January 6, 1950, the petitioner re-entered William Beaumont General Hospital while still suffering from symptoms of amebic dysentery. While a patient in this hospital, internal and external hemorrhoids of severe enough character to warrant corrective surgery was diagnosed, and such surgery recommended for such time that he was free of amebic dysentery and or amebiasis.

On or about February 13, 1950, while still infected with endamoeba histolytica and showing symptoms thereof (amebic dysentery), petitioner was ordered to submit to a hemorrhoid operation.

Petitioner requested postponement of said operation until he was free of amebiasis and or amebic dysentery. This request was aribitrarily and wrongfully refused, and therefore, he correctly refused to submit to said operation at that time.

On or about December 1, 1949, Capt. William Blocker examined the petitioner and made a diagnosis of "amebic dysentery" involving the colon. In the medical records, this report has been wrongfully changed to "amebiasis

involving the colon". This change was made subsequent to the appearance before the Physical Evaluation Board.

On March 24, 1950, petitioner was ordered before a Physical Evaluation Board at William Beaumont General Hospital over his protest due to prejudice against him at said hospital.

This board recognized the petitioner's need for further medical (surgical) treatment. Also, said board recognized the disability of his feet, but failed to give a rate of disability therefor due to the condition being congenital. This board recorded a finding of "physical fit", which was arbitrary and not in accordance with the law and the facts in the case.

Petitioner appealed the Board's decision to the Army Review Council. Said council returned the case to the Physical Evaluation Board for further hearing.

Petitioner, on May 23, 1950, pursuant to notice to appear for a reconvening of the original board, was given a hearing before a newly appointed and constituted Physical Evaluation Board. This board purported to hold a reconvening of the old board, but it refused to consider evidence submitted to the original board.

In addition, the board denied the petitioner the right to question witnesses on pertinent points.

This board announced a finding that the petitioner had "amebiasis" and gave as their reason for failing to give a physical disability rating, that the Veterans' Administration schedule for rating disabilities did not list "amebiasis".

However, when a record was made of the hearing and the finding of the board, the board recorded a recommendation that the petitioner be found "physically fit".

On August 2, 1950, petitioner was entitled under the laws of the United States and the Army Regulations to enlist in the Regular Army in the grade of Master Sergeant. He made application for such enlistment to enable him to continue on active service in the Army in the form, to the proper agency, and appeared at the regularly designed station for a medical examination. He was anomalously refused said examination.

Petitioner, on August 8, 1950, at 10:30 a.m., delivered a letter to the headquarters of William Beaumont General Hospital to the Commanding Officer thereof, expressing his intention to enlist in the Regular Army as a Master Sergeant, reporting the anomalous refusal of an examination, and requesting such an examination and/or proof or evidence of physical fitness in the necessary form to effect an enlistment within the time prescribed therefor. This request was arbitrarily refused and notification thereof given after his separation from the service on August 9, 1950.

The last regular army physical examination that the petitioner obtained was February 20, 1950, and it stated that he was not fit for further military duty.

Petitioner, on September 23, 1950, while still on terminal leave from the Army, went to the Trinity Hospital, Little Rock, Arkansas, and a physican noted the disability of petitioner's hemorrhoids, diagnosed amebic dysentery, and prescribed a course of treatments therefor.

Petitioner, on or about November 1, 1950, applied to the Adjutant General of the Arkansas National Guard for employment under Section 90, National Defense Act, of a nature similar to that in which he was employed prior to his entry into active military service on January 6, 1941. He was directed to submit to a medical examina-

tion as a prerequisite to such employment. As a result of said examination, employment was denied due to physical disability.

REASONS FOR GRANTING THE WRIT

The court below decided the case in error and with complete disregard of the facts and evidence presented and the statutory provisions applicable, as follows:

1. In ruling that petitioner did not serve on active duty as a Lieutenant Colonel in the Army of the United States, the court rejected evidence submitted by petitioner and erred in accepting evidence submitted by the Secretary of War concerning an appointment in the Officers' Reserve Corps, a completely separate matter immaterial to the issue involved.

2. The lower court's ruling that petitioner was physically fit for active service in the army when separated therefrom is contrary to the facts, the true findings of an Army physical evaluation board, the findings of an unbiased and qualified medical examining station and was made with complete disregard of the provisions of Section 413 of the Career Compensation Act of 1949.

3. In its motion for summary judgment in the court below the government (defendant) admitted to the disability of petitioner and gave as a reason for failing to give disability compensation therefor, that condition was congenital. The court recognized these admissions, but completely ignored the provisions of Section 402 of Career Compensation Act (63 Stat. 817; 37 U.S.C. 272) which provides in effect that since petitioner had more than eight years of active service, that he was entitled to such disability compensation regardless.

4. The lower court's ruling that repeated examinations failed to disclose the existence of the disease

"amoebic dysentery" is contrary to the facts as shown in the evidence presented, the findings of an army physical evaluation board, and the subsequent granting of disability compensation by the Veterans' Administration for stomach residerals of such disease.

5. The lower court recognized that the petitioner was in need of an operation when separated from active service, but completely ignored the provisions of the Act of June 19, 1948 (set out in this petition, p. 2).

6. The lower court erred in failing to take into consideration the Secretary of War's action in refusing to permit petitioner to enlist in the Regular Army as a Master Sergeant.

7. That lower court erred in failing to rule that petitioner's employment as a caretaker-mechanic, under authority of Section 90 of the National Defense Act was active service as defined by Section 412 of the Career Compensation Act. The petitioner having shown that, under regulations issued by the Secretary of War, that he was physically unfit to resume such duties and therefore physically unfit for active service.

CONCLUSION

This is a case involving a person who has spent most of his active life in the military service of his country in one manner or another. First, as a civilian employee while a member of the Arkansas National Guard, from 1921 to 1940, an approximate period of 19 years. Then from 1940, until his discharge in 1950, he served on active duty with the armed forces during World War II, a total of 29 years.

Upon his discharge in 1950, the Physical Evaluation Board made an announced finding that petitioner had "amebiasis", but gave as its reason for no disability, that the schedule of rating did not include such disease. However, when the official record of the board was made, it simply found the petitioner "physically fit". These facts are verified by an affidavit of one of the members of the board that was submitted to the lower court.

It is noteworthy, however, that this official record stated in substance "that the officer was advised to file his claim with the Veterans Administration. This may be common practice of the army, but it is certainly contrary to all applicable laws.

Petitioner, in order to continue his career in the army, attempted to enlist in the regular army as a Master Sergeant as he was entitled under the Army Regulations. This fact has never been satisfactorily explained by anyone or any army board. Petitioner verily believes that the reason was that he simply was not physically fit.

Upon his return to his home, petitioner made an application with the Arkansas National Guard for a job similar to the one held prior to his call to active service with the army. The application was rejected because the

medical examination disclosed that he was not physically fit.

As a result of this, the petitioner, after spending most of his career in the army or national guard, has now been forced to accept employment in other fields in order that he might survive.

Wherefore, petitioner prays that this Honorable Court issue its Writ of Certiorari to the Court of Claims to review the case; that upon its review of the case, that he be granted the relief to which his is entitled and as prayed for in his petition with the Court of Claims.

Respectfully submitted,

WILLIAM IRVING WOODFORD

Petitioner

Pro Se

APPENDIX A

In the United States Court of Claims

No. 225–55

(Decided May 8, 1957)

WILLIAM IRVING WOODFORD v. THE UNITED STATES

Mr. Frank H. Cox for the plaintiff.

Mr. Francis P. Borden, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

ON DEFENDANT'S AND PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

LARAMORE, *Judge*, delivered the opinion of the court:

Plaintiff, at present a lieutenant colonel in the Officers' Reserve Corps, presents three claims which will be disposed of in the order presented. The case arises on defendant's motion for summary judgment and plaintiff's cross-motion for summary judgment.

The first claim is for an amount by which the pay of a lieutenant colonel exceeds that of a major. This claim is based on plaintiff's advance to the higher rank in the Reserves and an alleged service in this advanced rank.

Plaintiff alleges in his petition that during the period from October 1, 1949, to and including October 8, 1950, he received the basic pay and allowances of a major and that during said period he held the rank and grade of a lieutenant colonel, thus entitling him to the higher pay of a lieutenant colonel for the above period.

Plaintiff's service record (defendant's exhibits 1 and 2) disclose the following: Plaintiff had enlisted service in the Arkansas National Guard from June 1, 1921, to May 18, 1923, and from July 14, 1923, to August 26, 1940, when he was honorably discharged as sergeant to accept a commission;

he was federally recognized as first lieutenant, Coast Artillery Corps, Arkansas National Guard, August 27, 1940; appointed first lieutenant, Coast Artillery Corps, National Guard of the United States, January 6, 1941; accepted and inducted into Federal service January 6, 1941; promoted to captain, Army of the United States, July 11, 1942, accepted July 15, 1942; promoted to major, Army of the United States, April 20, 1943; appointed lieutenant colonel, Coast Artillery Corps, Officers' Reserve Corps, July 16, 1947, accepted July 30, 1947; relieved from active duty August 9, 1950, not by reason of physical disability, and his commission as major, Army of the United States, was terminated on that date and he is now a lieutenant colonel, Artillary, United States Army Reserves. Plaintiff had active service as a commissioned officer from January 6, 1941, to August 9, 1950. From October 24, 1923, to August 26, 1940, plaintiff was also a civilian employee of the Arkansas National Guard in the capacity of caretaker-mechanic, at which time he received a National Guard commission and was no longer eligible for civilian employment.

Plaintiff's appointment as a lieutenant colonel in the Reserves (defendant's exhibit 5) discloses the following:

> 4. This does not affect your current active duty status and you will not perform the duties of an officer under this appointment until so directed by competent orders.

Plaintiff's oath of office (defendant's exhibit 7) contains a report of entry on active duty, which is blank. Thus it can be seen that the highest rank in which plaintiff served on active duty was that of major, and it was never intended that he perform any duties under his appointment as a lieutenant colonel until so directed by competent orders. None were ever issued.

Plaintiff claims entitlement to the increased pay under the Career Compensation Act of 1949, 63 Stat. 802, 806. However, he cites no provision of that act that entitles him to pay in a rank other than the rank in which he served. On the other hand, section 201 (b) of the above act provides:

> (b) For basic pay purposes, commissioned officers are hereby assigned by the rank or grade *in which serving*, * * *. [Italics supplied.]

Furthermore, section 7 of the Act of April 26, 1898, 30 Stat. 364, 365, provides:

> Sec. 7. That in time of war every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade, shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised: * * *.

These conditions obviously were not met.

The highest rank in which plaintiff served was that of major. He was paid as a major and is entitled to nothing further under this claim.

The second claim of plaintiff is for active-duty pay of the rank and grade of lieutenant colonel from October 10, 1950, continuing until plaintiff is retired for physical disability. Plaintiff bases this claim upon his separation from active service in the Army while in need of medical treatment, including surgery. He contends this was in violation of the provisions of the Act of June 19, 1948, 62 Stat. 489, and without a full and fair hearing as to his physical fitness as provided for by section 413 of the Career Compensation Act of 1949, *supra*.

The short answer to this contention is that plaintiff was separated from active military service as a result of his selection for separation under the provisions of section 515 (d) of the Officer Personnel Act of 1947, 61 Stat. 795, 907, which provides:

> (d) To the extent provided from time to time by appropriations for this purpose, any officer of any Reserve compo. ent of the Army of the United States may, with his own consent, be ordered to active Federal duty for such length of time as the President may prescribe and in time of a national emergency expressly declared by Congress may be so ordered without his consent. The President may at any time relieve from active duty any Reserve officer who is serving on active duty. Any officer of any Reserve component ordered into or serving on active duty may, with his own consent, be temporarily appointed in a grade in the Army of the United States, either higher or lower than the grade held by him in such Reserve component, and such temporary appointment shall not affect the appointment and grade held by him in his Reserve component.

Thus his service was entirely at the pleasure of the President. All the boards before which plaintiff appeared found him physically fit for duty. His final medical summary listed him as fit for duty as of August 4, 1950. He was separated honorably from the Army, as a major, under the above-quoted act on August 9, 1950. This separation ended his active-duty status and his entitlement to active-duty pay. Therefore, plaintiff is entitled to nothing under his second claim.

Plaintiff's third claim is that if he is not found to be entitled to pay as contended for in his second claim, he claims disability retirement pay from August 10, 1950, as though retired for 75 percent, or more, disability and/or 30 years of active service as defined by section 412 of the Career Compensation Act of 1949, *supra*, under the provisions of section 402 (b) of said act.

Section 402 (b) provides that "upon a determination by the Secretary concerned * * *." It is clear here that the Secretary concerned determined that plaintiff was fit for duty. In doing so the Secretary followed the unanimous recommendations of all the examining and reviewing boards that had considered plaintiff's case. A medical board twice found plaintiff fit for duty. Twice a physical evaluation board found plaintiff fit for duty. The proceedings of the physical evaluation board were approved by the Army Physical Review Council, and on the basis of all these findings and recommendations the Secretary found plaintiff fit for duty.

Only the Secretary of the Army had authority to make this determination. This court has many times held that no court has power to review the action of the Secretary, absent allegations and proof of arbitrary or capricious action of the Secretary, or that his decision is contrary to law. *Prichard v. United States*, 133 C. Cls. 212.

Plaintiff does not allege that the Secretary's action was arbitrary. Indeed the record shows that the action was not arbitrary. Plaintiff was afforded every opportunity to present his case and on all occasions was found fit for duty. He does say, however, that his separation was erroneous and contrary to law in that the same violated the provisions of the Act of June 19, 1948, 62 Stat. 489, which provides:

> * * * That, notwithstanding any other provision of law, the President is authorized and directed to retain in service disabled officers, warrant officers, and flight officers of the Army and the Air Force of the United States until their treatment for physical reconstruction has reached a point where they will not be further benefited by retention in a military hospital or in the military service.

The record here discloses the only treatment which plaintiff was not given was an operation for hemorrhoids, and this because of plaintiff's refusal to submit to said operation. However, the Army found the ailment was not incapacitating in any event. He complained of amoebic dysentery. However, repeated examinations failed to disclose the existence of the disease. He complained of flat feet and astigmatism. He was afflicted with both upon entry to active service. He complained of loose bowels. His stools were examined and found to be normal. Thus it all adds up to this—plaintiff is asking this court to find that he was not fit for active duty. This court has many times held that it cannot undertake to determine who is fit or unfit to serve in the military forces. *Holiday* v. *United States*, 128 C. Cls. 647; *Wales* v. *United States*, 132 C. Cls. 765; *Beamish* v. *United States*, 130 C. Cls. 767.

Plaintiff then alleges he made application to the Army Board for Correction of Military Records and that said board gave him no formal hearing, stating there was no justification for a review of his case.

Apparently plaintiff makes this allegation to show that he has exhausted all administrative remedies. At any rate he makes no allegation of arbitrary action on the part of the board, and without such an allegation this court would not consider said action. Furthermore, under our decisions in *Gordon* v. *United States*, 129 C. Cls. 270, and *Wales* v. *United States*, *supra*, when plaintiff invokes the jurisdiction of the Army Board for Correction of Military Records he is bound by the action of that board unless it is clearly shown that the action of the board was arbitrary or capricious.

When the allegations of the petition, defendant's answer and the exhibits attached thereto are considered, it becomes

apparent that the acts of the various officers were not arbitrary and were according to law. See *Johnson* v. *United States*, No. 494–55, decided April 3, 1957. Therefore, plaintiff cannot recover under his third claim.

Plaintiff's motion for summary judgment is denied. The defendant's motion for summary judgment is granted, and the petition is dismissed.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge*, concur.

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OCTOBER TERM, 1957

WILLIAM IRVING WOODFORD, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. 15–20) is not yet officially reported.

JURISDICTION

The decision of the Court of Claims was entered May 8, 1957. On August 7, 1957, an order of Mr. Justice Frankfurter extended the time for filing a petition for a writ of certiorari to and including August 20, 1957, and the petition was filed August 20, 1957. The jurisdiction of this Court is apparently invoked under 28 U. S. C. 1255 (1).

QUESTIONS PRESENTED

1. Whether petitioner was entitled to the pay of a Lieutenant Colonel upon his advancement to that rank in the Officer's Reserve Corps, even though he never served on active duty in any rank higher than that of Major.

2. Whether petitioner was improperly separated from active military service while in need of medical treatment.

3. Whether petitioner is entitled to disability retirement pay from the date of his release from active duty at a 75 percent disability rate.

STATUTES INVOLVED

The pertinent statutory provisions are set out in the Appendix, *infra*, pp. 8–10.

STATEMENT

Petitioner is a Lieutenant Colonel in the United States Army Reserve (Pet. 15). He served as an enlisted man in the Arkansas National Guard from June 1, 1921 until August 26, 1940, when he was commissioned as a First Lieutenant in the National Guard (Pet. 16). On January 6, 1941, he received a commission as a First Lieutenant in the Army of the United States (Pet. 16). He served on active duty as a commissioned officer from that date until August 9, 1950, when he was relieved from active duty, not by reason of physical disability (Pet. 16).

The highest rank in which petitioner served on active duty was that of Major (Pet. 16). On July 16, 1947, however, petitioner received an appointment

in the Officer's Reserve Corps, Army of the United States, as a Lieutenant Colonel. This appointment provided (Pet. 16):

> This does not affect your current active duty status and you will not perform the duties of an officer under this appointment until so directed by competent orders.

No orders were ever issued ordering petitioner to duty as a Lieutenant Colonel, and accordingly, he continued to serve on active duty as a Major until his release in 1950 (Pet. 16).

Commencing in 1949, petitioner made a number of complaints to Army medical authorities concerning his health. Repeated hospital examination, however, disclosed only flat feet, from which petitioner had suffered prior to his induction into the service, astigmatism, minor stomach disorders, and moderate hemorrhoids (Pet. 19). Petitioner was scheduled for corrective surgery for the hemorrhoid condition but refused the operation. The Army found that in any event this condition was not incapacitating, and ordered his return to duty (Pet. 19). Petitioner thereupon requested and received a number of hearings before various medical boards, all of which found petitioner fit for duty (R. 30–31). These findings were ultimately approved by the Secretary of the Army (R. 31), and petitioner was released to inactive duty under the provisions of the Officers' Personnel Act of 1947, *infra*, p. 8, not by reason of physical disability (R. 31). His final medical summary lists him fit for duty as of August 4, 1950 (R. 31). On February 13, 1951, petitioner was awarded $24

monthly by the Veterans' Administration for hemorrhoids and residuals of a stomach condition. His claims for flat feet and astigmatism were denied as not service connected (R. 32).

On June 7, 1955, petitioner filed this suit in the Court of Claims, presenting three claims arising from his military service (Pet. 15). On cross motions for summary judgment, the Court of Claims rejected all of petitioner's contentions and awarded judgment for the United States (Pet. 15-20). Petitioner claimed, first, that during the period from October 1, 1949 through October 8, 1950, he received pay of a Major but was actually entitled to the pay of a Lieutenant Colonel, and he sought recovery of the difference (Pet. 15). In rejecting this contention, the Court of Claims pointed out that petitioner's promotion to Lieutenant Colonel expressly stated that it did not affect his current duty status, and that in fact he had never served in a higher grade than that of Major. The court concluded (Pet. 17): "He was paid as a Major and was entitled to nothing further under this claim." Petitioner's second claim was that he was improperly separated from active service while in need of medical treatment, including surgery, and he therefore sought to recover the active duty pay of a Lieutenant Colonel from October 10, 1950, the day after he was relieved from active duty, until he is retired for physical disability. The Court of Claims noted, however, that petitioner's active service was entirely at the pleasure of the President, and that he was honorably separated as a Major under the provisions of Section 515 (d) of the Officers' Personnel Act of 1947, *infra*,

p. 8. The court found that all of the boards before which the petitioner appeared found him physically fit for duty, that his separation as a Major, not by reason of physical disability, was proper, and that it ended his active duty status and his entitlement to active duty pay.

Petitioner claimed, finally, that if he is not found to be entitled to pay as contended in his second claim, he nevertheless should receive disability retirement pay at the rate of 75 percent or more from the date of his release from active duty under the provisions of Section 402 (b) of the Career Compensation Act of 1949, *infra*, pp. 9–10. The Court of claims pointed out, however, that the benefits of this Section are expressly predicated upon a determination of disability by the Secretary concerned, and that the Secretary of the Army here had clearly found petitioner fit for duty. The court held that the consistent findings as to petitioner's fitness by the Army medical boards, as confirmed by the Secretary, were not arbitrary and were in accordance with law (Pet. 18–20), and were not reviewable on the merits in a judicial proceeding. The court concluded (Pet. 19):

> * * * Thus it all adds up to this—plaintiff is asking this court to find that he was not fit for active duty. This court has many times held that it cannot undertake to determine who is fit or unfit to serve in the military forces.

ARGUMENT

Petitioner's contentions were carefully examined by the Court of Claims and found to be totally without merit. The decision below was clearly correct, and

there is no basis for further review of petitioner's claims by this Court.

1. There is no substance to petitioner's claim that for a period of time he was entitled to the pay of a Lieutenant Colonel rather than that of a Major. The only statutory authority which he cites in support of this claim, the Career Compensation Act of 1949, *infra*, pp. 9–10, expressly provides in Section 201 (b) that the pay of commissioned officers is to be determined "by the rank or grade in which serving * * *." Petitioner never served in any rank higher than that of Major, and he received the pay of this rank; he is entitled to nothing further.

2. Equally groundless is petitioner's contention that he was improperly separated from active service while in need of medical treatment. Petitioner's physical fitness was established after repeated hearings before various Army medical boards whose findings were approved by the Army Physical Review Council and ultimately by the Secretary of the Army. As the court below recognized (Pet. 19), this determination of petitioner's fitness is final, and not reviewable in any judicial proceeding. See, *e. g.*, *Beamish* v. *United States*, 130 C. Cls. 767; *Holliday* v. *United States*, 128 C. Cls. 647. On the basis of this determination, petitioner was returned to active duty status and, as a reserve officer serving entirely at the pleasure of the President, was properly separated under the provisions of the Officers' Personnel Act.

3. The final determination by the Secretary of the Army that petitioner was physically fit at the time of his release disposes as well of petitioner's third con-

tention, *i. e.*, that he was entitled to receive disability retirement pay from the date of his release from active duty under the provisions of Section 402 (b) of the Career Compensation Act of 1949, *infra*, pp. 9–10. By the express terms of that statute, disability retirement pay thereunder is predicated upon a determination of disability by the Secretary of the service concerned. Since a contrary determination was made in the present case, petitioner is not entitled to benefits under this statute.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1957.

APPENDIX

Section 515 (d) of the Officers' Personnel Act of 1947 (61 Stat. 906, 907, 10 U. S. C. 506d (d)) provides:

> To the extent provided from time to time by appropriations for this purpose, any officer of any Reserve component of the Army of the United States may, with his own consent, be ordered to active Federal duty for such length of time as the President may prescribe and in time of a national emergency expressly declared by Congress may be so ordered without his consent. The President may at any time relieve from active duty any Reserve officer who is serving on active duty. Any officer of any Reserve component ordered into or serving on active duty may, with his own consent, be temporarily appointed in a grade in the Army of the United States, either higher or lower than the grade held by him in such Reserve component, and such temporary appointment shall not affect the appointment and grade held by him in his Reserve component.

Act of June 19, 1948 (62 Stat. 489, 10 U. S. C. 499a) provides:

> *Disabled emergency officers retained in service during treatment.*
>
> Notwithstanding any other provision of law, the President is authorized and directed to retain in service disabled officers, warrant officers, and flight officers of the Army and the Air Force of the United States until their treatment for physical reconstruction has reached a point where they will not be further benefited by retention in a military hospital or in the military service.

Section 201 (b) of the Career Compensation Act of 1949 (63 Stat. 806, 37 U. S. C. 232 (b)) provides:

> For basic pay purposes, commissioned officers are hereby assigned by the rank or grade in which serving, whether under temporary or permanent appointment, to the various pay grades prescribed for commissioned officers by subsection (a) of this section, as follows: * * *

Section 402 (b) of the Career Compensation Act of 1949 (63 Stat. 817, 37 U. S. C. 272 (b)) provides:

> Upon a determination by the Secretary concerned (1) that a member of a Regular component of the uniformed services entitled to receive basic pay, or a member of a Reserve component of the uniformed services entitled to receive basic pay who has been called or ordered to extended active duty for a period in excess of thirty days, is unfit to perform the duties of his office, rank, grade, or rating, by reason of physical disability incurred while entitled to receive basic pay; (2) that such disability is not due to the intentional misconduct or willful neglect of such member and that such disability was not incurred during a period of unauthorized absence of such member; (3) that such disability is 30 per centum or more in accordance with the standard schedule of rating disabilities in current use by the Veterans' Administration; (4) that such member has completed at least eight years of active service as defined in section 282 of this title; and (5) that accepted medical principles indicate that such disability may be of a permanent nature, the name of such member shall be placed upon the temporary disability retired list of his service by the Secretary concerned and such members shall be entitled to receive disability retirement pay as prescribed in subsection (d) of this section: *Provided*, That, if condition (5) above is not by a finding that

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such disability is of a permanent nature, such member may be retired by the Secretary concerned and, upon retirement, shall be entitled to receive disability retirement pay as prescribed in subsection (d) of this section: *Provided further*, That if condition (3) above is not met because the disability is determined to be less than 30 per centum, the member concerned shall not be eligible for any disability retirement provided in this section, but may be separated for physical disability from the service concerned and upon separation shall be entitled to receive disability severance pay as prescribed in section 273 of this title: *And provided further*, That regardless of the percentage of disability determined to have been incurred, if condition (4) above is not met because the member concerned has completed less than eight years of active service as defined in section 282 of this title at the time he would otherwise have been retired pursuant to this subsection, the member concerned shall not be eligible for any disability retirement provided in this section, but may be separated for physical disability from the service concerned and upon separation shall be entitled to receive disability severance pay as prescribed in section 273 of this title.

Section 414 (a) of the Career Compensation Act of 1949 (63 Stat. 825; 37 U. S. C. 284 (a)) provides:

SECTION 414 (a). All duties, powers, and functions incident to the determination of fitness for active service, percentage of disability at the time of separation from active service, and suitability for reentry into active service and entitlement to and payment of disability severance pay shall be vested in the Secretary concerned.